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In The

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

Respondent does not engage much less refute Petitioner's core contention in this case – that the Texas Court of Criminal Appeals' ("CCA") conclusion of "harmless error" was wholly based on its view that jurors could "take into account" Petitioner's evidence of his 78 I.Q., long-term placement in special education, and abusive family background. Having abandoned its defense of the CCA's opinion on its own terms, Respondent now insists that the CCA's judgment can be defended on the ground that Petitioner's mitigating evidence was insubstantial and marginalized in its presentation. But the CCA's own characterization of Petitioner's mitigating evidence, amply supported by the record in this case, compels the conclusion that Petitioner is entitled to relief on his federal constitutional claim even under the egregious harm standard applied by the CCA.

Even though Petitioner is plainly entitled to relief under the egregious harm standard, the CCA's imposition of that standard independently violates federal law. Respondent fails to offer any persuasive defense of the CCA's decision to revisit its determination regarding the adequacy of Petitioner's trial objection to the sentencing instructions, which was essential to trigger the CCA's heightened harm standard. The only fair reading of the CCA's decisions in this case is that the CCA impermissibly revisited the adequacy of Petitioner's trial objection. Far from constituting an independent and adequate state ground of decision, the CCA's post-remand finding that Petitioner's trial objection was inadequate, and its resulting imposition of its "egregious harm" standard, violated federal law. Because Petitioner undoubtedly suffered at least "some harm" given that his most compelling mitigating evidence could be given only aggravating effect at sentencing, the unjustified imposition of the egregious harm standard separately requires relief.

Much of the argument in Respondent's Brief and the *amicus* briefs offered on its behalf strays from the core

issues in this case and invites this Court to engage broad questions about the power of states to subject federal constitutional claims to harmless error review. This case, in which the outcome is dictated by the state court's unwillingness on remand to embrace this Court's federal constitutional holding, is an inappropriate vehicle for answering difficult, far-reaching questions about the appropriate contours of state harmless-error analysis. Because Petitioner does not rely, and does not need to rely, on the propositions attacked in the *amicus* briefs, this Court should simply hold that a state court may not reject the federal constitutional holding of this Court on remand by cloaking its rejection in purported harmless error analysis.

ARGUMENT

I. RESPONDENT FAILS TO ADDRESS PETITIONER'S CORE CONTENTION THAT THE STATE COURT'S HARMLESS ERROR ANALYSIS OF THE CONSTITUTIONAL ERROR IN THIS CASE CONSTITUTED A REJECTION OF THE MERITS OF THIS COURT'S OPINION.

Respondent inexplicably fails to address the first question presented in this case and the core argument for granting relief – that the CCA's conclusion of "harmless error" rested wholly on its view that jurors were able to give effect to Petitioner's mitigating evidence via the special issues and the nullification instruction, notwithstanding this Court's explicit rejection of that conclusion in its summary reversal. Contrary to Respondent's argument, the CCA did not deny relief because it viewed Petitioner's mitigating evidence of his 78 I.Q., his long-term placement in special education, and his abusive family background as insubstantial or unlikely to persuade jurors to return a life sentence. Instead, the CCA acknowledged, correctly, that Petitioner's "extensive mitigating evidence" was powerfully woven into a "compelling theory of the case." *Ex parte*

Smith, 185 S.W.3d 455, 471-72 (Tex. Crim. App. 2006); JA: 296, 298. But the CCA found no "egregious harm" because it explicitly challenged and rejected this Court's conclusions under *Penry I* and *Penry II* that the special issues and nullification instruction did not permit adequate consideration of Petitioner's concededly powerful mitigating evidence.

Despite this Court's clear holding that the inquiries of the Texas special issue scheme "had little, if anything, to do with the mitigation evidence petitioner presented," *Smith v. Texas*, 543 U.S. 37, 48 (2004); JA: 235, on remand the CCA concluded precisely the opposite – arguing that Petitioner's evidence of low intelligence, possibly organic brain impairment, and abusive background could somehow be given *mitigating* effect via the future dangerousness special issue. *Ex parte Smith*, 185 S.W.3d at 465-66; JA: 285-86. Indeed, notwithstanding the clarity of this Court's holding that the special issues failed to encompass Petitioner's mitigating evidence, the CCA announced on remand that "[t]he Supreme Court did not address our conclusion 'that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.'" *Id.* at 465; JA: 281. Although the CCA ultimately and grudgingly acknowledged that "[i]t is possible that the two special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence," *id.* at 472; JA: 298, it is clear that its finding of no "egregious harm" was powerfully informed by its view, contrary to this Court's summary reversal, that the special issues in fact ensured significant consideration of Petitioner's evidence.

More fundamentally, the CCA's finding of harmless error depended on its view that the nullification instruction cured any *Penry I* error, again directly contrary to this Court's summary reversal. According to the CCA, this Court's opinion had identified only a "theoretical" problem with the nullification instruction, *Ex parte Smith*, 185 S.W.3d at 468; JA: 291, and the CCA concluded that

further examination of the record confirmed that jurors would have *actually* believed themselves free to falsify their answers to the special issues to achieve a life sentence. In reaching this conclusion, the CCA, as part of its purported "harm" analysis, reviewed the voir dire concerning jurors' willingness to follow the nullification command and emphasized that the prosecution had not insisted that jurors ignore evidence outside of the special issues. *Id.* at 468, 471; JA: 290, 296. These considerations culminated in the CCA's explicit conclusion that jurors were not precluded from "tak[ing] into account the specific evidence of [Petitioner's] relatively low I.Q. test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." *Id.* at 471; JA: 296-97. This conclusion, far from being a state ground for decision as urged by Respondent, is nothing less than a repudiation of this Court's federal constitutional judgment in this case "that the nullification instruction was constitutionally inadequate under *Penry II*." *Smith*, 543 U.S. at 48; JA: 236.

In its Brief in Opposition to Certiorari, Respondent sought to defend the CCA's approach, insisting that "the voir dire examination is the strongest evidence in this case against Smith's position" because "it indicates that *every juror who sat in judgment of Smith agreed to use the nullification instruction to change a true 'yes' answer to 'no' if he or she believed the mitigating evidence warranted a life sentence.*" B.I.O. at 25 (emphasis in original).[1] Now, Respondent has reversed course and makes no effort to defend the CCA's opinion on its own terms. Instead, Respondent blandly and generally claims that the CCA has "consistently strived to properly implement the Court's evolving capital jurisprudence," Respondent's Brief

[1] This language also appears virtually verbatim in Respondent's pleadings on remand urging the CCA to hold that jurors could in fact have given effect to Petitioner's mitigating evidence via the nullification instruction. *See* Reply Brief on Remand at 6; JA: 263.

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("R.B.") at 8, without discussing much less engaging the CCA's obvious rejection of this Court's holding that the special issues and nullification instruction were constitutionally inadequate in the context of petitioner's trial. Instead, Respondent mischaracterizes Petitioner's objection to the CCA's opinion as a claim that the CCA violated "not the letter, but really the *spirit* of the summary reversal." R.B. at 20 (emphasis in original). In doing so, Respondent ignores the numerous quotations from the CCA's opinion that flatly contradict quotations from "the letter" of this Court's summary reversal.

Although the bulk of the CCA's opinion sought to establish the absence of *Penry I* error and the workability of the nullification instruction in this case, and the bulk of Petitioner's brief demonstrated that such an approach was inconsistent with this Court's mandate, Respondent fails altogether to address this issue. That failure compels the conclusion that there is simply no plausible defense of the CCA's reasoning in the decision below.

II. STRIPPED OF ITS REPUDIATION OF THIS COURT'S SUMMARY REVERSAL, THE CCA'S DECISION ON ITS OWN TERMS REQUIRES RELIEF.

Once it is acknowledged, as this Court has already held, that the special issues and nullification instruction failed to ensure constitutionally adequate consideration of Petitioner's evidence of his mental impairment and abusive background, the constitutional error found by this Court cannot be dismissed as harmless, even under the egregious harm standard applied by the CCA. For the reasons we argue below, *see infra* Part III, the CCA's application of its egregious harm test was itself an impermissible evasion of this Court's mandate, and Respondent has offered nothing to undermine that conclusion. This Court could nonetheless grant relief without deciding that issue because the constitutional error in this case deprived Petitioner of a "fundamentally fair trial" under the CCA's

egregious harm standard. *Ex parte Smith*, 185 S.W.3d at 472; JA: 298. The CCA's own characterization of Petitioner's strong mitigation case, independently confirmed by the trial record, establishes that the error in this case was not harmless under any standard, once the CCA's decision is shorn of its impermissible attempt to revisit this Court's *Penry I* and *Penry II* rulings.

The CCA itself repeatedly acknowledged the scope and power of Petitioner's mitigating evidence. The CCA never denigrated the quantity or the significance of the mitigating evidence offered by Petitioner; rather, the *only* ground the CCA offered for finding that Petitioner had not suffered egregious harm was its failed attempt to avoid this Court's conclusions that *Penry I* and *Penry II* error in fact occurred. The CCA's portrayal of Petitioner's mitigating evidence as "extensive" and of its presentation as "dramatic," *Ex parte Smith*, 185 S.W.3d at 471-72; JA: 296-98, is amply borne out by the record of both the guilt and penalty phases of Petitioner's trial, in which extensive testimony, documentary evidence, and argument were focused upon his cognitive impairments and his traumatic childhood. But this extensive evidence – including evidence of his 78 I.Q., his life-long learning disabilities that resulted in his placement in 9th grade at the age of 19, and his abusive family situation – could not be given mitigating effect, leaving only its aggravating import as to Petitioner's future dangerousness before the jury. Without the CCA's impermissible conclusion that jurors were able "to take into account" precisely these mitigating facts, *id.*, it is plain that Petitioner's capital sentencing proceeding cannot be deemed fundamentally fair. As this Court stated in its summary reversal in this case, "[t]here is no question that a jury might well have considered petitioner's I.Q. scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." *Smith*, 543 U.S. at 44; JA: 231-32.

Respondent resists this obvious conclusion by repudiating the CCA's own characterization of the strength of Petitioner's mitigating evidence, by distorting the record of Petitioner's trial, and by disregarding this Court's precedents on the significance of evidence of mental impairment and childhood abuse. Respondent's claim that Petitioner's evidence of mental impairment and abusive childhood was not a prominent part of the defense case runs counter to the CCA's own depiction of the trial and grossly misrepresents the record in this case. Defense counsel laid the groundwork for the mitigation case during the guilt phase of the trial. Petitioner's mother, Johnnie Mae Smith, testified at length about Petitioner's intellectual deficits, early developmental problems, and his inability to progress at school. JA: 49-59. She also described the impact on LaRoyce of the behavior of his father, who repeatedly stole from the family to support his crack-cocaine habit. JA: 55-58. LaRoyce also testified about his father's abuse, including an incident in which his father threatened him with a butcher knife while attempting to steal the family car. JA: 61-62. At guilt-phase closing arguments, defense counsel emphasized LaRoyce's comparative lack of culpability in light of his mental impairment. JA: 66 ("LaRoyce is the one who flunks the first grade after he's been in Head Start since he was three years old. LaRoyce is 19 years old and he's in the ninth grade. Yeah, he's the brains.").

During the punishment phase, the most important defense witness by any measure was Alberta Pingle, a specialist in the Dallas Independent School District special education department. Through Ms. Pingle, the defense offered into evidence voluminous school records documenting LaRoyce's low intelligence, low achievement, learning disabilities, and possibly organic brain impairment. Ms. Pingle testified that LaRoyce had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. JA: 75-79. She also stated that testing through the school district indicated that LaRoyce's verbal I.Q. was 75 and full scale I.Q.

was 78. JA: 85; JA II: 58. Through Ms. Pingle, the defense also introduced an expert's report that indicated that LaRoyce's learning problems were possibly organic in nature. JA: 80-81; JA II: 25. The school records introduced via Ms. Pingle and discussed by her in front of the jury offered a compelling account of LaRoyce's lifelong impairment and academic failures. *See* Petitioner's Brief ("P.B.") at 4-5.

Respondent seeks to minimize the significance of this extensive presentation by arguing that Ms. Pingle was only one of twenty defense witnesses and that the "vast majority" of those witnesses testified about LaRoyce's nonviolent character. R.B. at 36. Although only "one" witness, Ms. Pingle's testimony allowed the jury to "hear" from the scores of teachers, special education committees, and school psychologists who had documented LaRoyce's impairments over fourteen years. Although only "one" of twenty defense witnesses, Ms. Pingle's testimony accounted for over one-quarter of the defense testimony offered at the punishment phase. Moreover, through Ms. Pingle, the jury received over two hundred pages of school records (the entire second volume of the Joint Appendix in this case) and even the prosecution emphasized that the jury had the "entire files" concerning LaRoyce's school performance. JA: 96. Tellingly, defense counsel sought to emphasize the school records by organizing them into several enlarged charts that were separately introduced as exhibits. JA: 74-75; Defense Exhibits 39, 48, 50. The prosecution repeatedly objected, unsuccessfully, to the admission of these exhibits, JA: 74, and engaged in more cross-examination of LaRoyce's punishment-phase witnesses on the issue of his low intelligence than on his nonviolent character. When the jury undertook its punishment-phase deliberations, the hundreds of pages of school records, charts, and testimony documenting LaRoyce's intellectual impairment offered by far the strongest basis for withholding a death sentence, yet the sentencing instructions did not ensure that jurors could use such

evidence other than as support for the State's case that LaRoyce would be dangerous in the future.[2]

Notwithstanding this extensive presentation of evidence of mental impairment and parental abuse, Respondent insists that the error in this case should be deemed harmless because, unlike Penry, Petitioner failed to offer evidence of "mental retardation." According to Respondent, if *Penry* error involving defendants with evidence of mental impairment short of mental retardation can be deemed harmful, *Penry* error would essentially become "structural" and require relief in all cases. R.B. at 40. Respondent's position looks suspiciously like the CCA position[3] that this Court summarily reversed here and rejected in *Tennard* – that *Penry* applies only to defendants with evidence of mental retardation. *See Tennard v. Dretke*, 542 U.S. 274, 288 (2004). When, as here, the defendant offers an extensive case of mental impairment and parental abuse through numerous witnesses and detailed exhibits, the CCA acknowledges the powerful presentation of that evidence, and this Court holds that the evidence was beyond the effective reach of the jury, Respondent cannot resurrect the discredited "mental retardation" bar as a prerequisite to relief for the acknowledged constitutional violation.

Nor can Respondent claim that the presence of other defense witnesses somehow diminished the harm of the constitutional error in this case. The fact that the defense offered extensive rebuttal testimony to the State's case on future dangerousness *enhances*, rather than detracts from,

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[2] Several of the remaining witnesses testified about the difficulties LaRoyce faced in light of his father's abusive actions toward him and the family. *See* P.B. at 5; JA: 69 (testimony of Reverend Nicks); JA: 104 (testimony of Dorothy Faye Ellis); JA: 101 (testimony of Myron Wilson).

[3] *See Ex parte Smith*, 132 S.W.3d 404, 414 (Tex. Crim. App. 2004); JA: 187 (CCA holding, in its first denial of relief in this case, that Petitioner's evidence was addressable within the special issues because a " 'slow learner' is not, *ipso facto*, mentally retarded").

the likelihood of harm in this case; the jury's inability to give effect to Petitioner's *affirmative* mitigating case is of much greater significance where the State's dangerousness case has been vigorously contested. Moreover, the fact that defense counsel made a wide range of arguments in his punishment-phase closing argument in no way suggests that the evidence of impairment and abuse was insubstantial. Defense counsel had already raised the issue of Petitioner's mental impairment during the guilt-phase closing argument. JA: 66. His punishment-phase closing emphasized again that Petitioner had been in special education for years, and that his school testing revealed an I.Q. of 78. Defense counsel specifically argued that LaRoyce was "eight points from being mentally retarded" and that the "medical diagnosis" of his learning disability pointed to a potentially "organic" cause. JA: 120. In light of the overwhelming testimony and documents introduced by Petitioner to establish his impairment, and trial counsel's repeated efforts to highlight those facts in both the guilt and punishment phase arguments, Respondent cannot assert that the jury's inability to consider such evidence was harmless on the grounds that the defense argued other points as well.[4] Indeed, under Respondent's page-counting approach to the closing argument, undisputed evidence of mental retardation might itself be deemed harmless if defense counsel, as here, makes his

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[4] The unreasonableness of Respondent's efforts to trivialize Petitioner's impairment is reflected in its claim that "two witnesses who knew Smith well" testified to his average or above-average intelligence. R.B. at 39 n.40. That testimony came on the State's cross-examination of LaRoyce's fiancée and prospective mother-in-law. JA: 97-99. Respondent's effort to minimize the significance of Petitioner's impairment is also difficult to square with this Court's characterization of Petitioner's evidence in its summary reversal. *Smith*, 543 U.S. at 44; JA: 231 (indicating that Petitioner, like the defendant in *Tennard v. Dretke*, 542 U.S. 274, 278 (2004), offered evidence of " 'significantly impaired intellectual functioning' ").

point about the existence of the significant impairment and moves on.

Respondent's attempt to minimize the importance of Petitioner's mitigating evidence also flies in the face of this Court's decisions on the mitigating significance of evidence of low intelligence and childhood abuse. As for low intelligence, this Court has recognized that cognitive impairment at the level of mental retardation renders a defendant constitutionally ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002). Petitioner, whose 78 I.Q. placed him "eight points from being mentally retarded," JA: 120, and whose school records documented a lifetime of impaired intellectual functioning, JA II, had an extremely strong claim of "diminish[ed] personal culpability" for his actions based on his intellectual deficiencies. *Atkins*, 536 U.S. at 318. As for childhood abuse, this Court has repeatedly recognized the power of such evidence to sway the single juror necessary to elicit a life sentence. *See Wiggins v. Smith*, 539 U.S. 510, 512 (2003) (evidence of childhood abuse established a "reasonable probability that at least one juror would have struck a different balance"); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (evidence that defendant was borderline mentally retarded, coupled with evidence of childhood abuse, "might well have influenced the jury's appraisal of his moral culpability").

Moreover, unlike the defendants in *Wiggins* and *Williams*, who were merely denied the mitigating effect of evidence of their cognitive impairments and childhood abuse because their lawyers failed to present it, Petitioner was also harmed by the "double-edged" effect of his evidence, because it offered the jury new reason to consider him dangerous, yet provided no vehicle for giving the evidence mitigating effect. Respondent seeks to deflect this concern by arguing that "under *Tennard*," Petitioner's evidence was not "two-edged" because it was not as severe

as Penry's. R.B. at 40. It is extraordinary that Respondent refers to *Tennard* (without citing any particular page) for this proposition, because this Court in *Tennard* held exactly the opposite: "[T]he jury might well have given Tennard's low I.Q. evidence aggravating effect in considering his future dangerousness . . . as a matter of probable inference." 542 U.S. at 288-89. Only the *dissent* in *Tennard* embraced Respondent's position that "low intelligence is not the same as mental retardation and does not necessarily create the same *Penry I* 'two-edged sword.'" 542 U.S. at 292-93 (Rehnquist, C.J., dissenting). Respondent's argument for harmless error in this case is wholly dependent on such distortions of this Court's holdings on the significance of evidence of low intelligence and childhood abuse in the context of the Texas capital sentencing scheme.[5]

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[5] Respondent also devotes substantial argument to establish that "*Penry* error is not structural error exempt from harmless-error analysis." R.B. at 40. Petitioner has not sought reversal on that basis, believing that the CCA's finding of harmlessness must be reversed in any event because its finding of harm depended wholly on its rejection of this Court's federal constitutional holding. In a similar vein, the *amicus* briefs filed on behalf of Respondent seek to go beyond the issues before this Court and to transform a fact-bound case of state non-compliance with this Court's mandate into a vehicle for abstract theorizing about presently-immaterial principles relating to the permissible scope of state harmless error analysis in general. The brief filed on behalf of the *amici* States, like Respondent's brief, urges this Court to decide whether *Penry* error is subject to harmless error analysis (although, *amici* States, like Respondent, do not address whether *Penry II* error is structural because it filters all of the mitigating evidence in the case through a command to deliver a false verdict). The *amici* States also seek a declaration from this Court that state courts and legislatures are free to adopt whatever standard of harm they choose in state post-conviction proceedings, on the theory that states need not provide post-conviction fora at all. But since Petitioner does not challenge in this litigation the power of states to apply non-*Chapman* harmless error rules in state post-conviction proceedings to unpreserved claims, all of the arguments advanced by the *amici* States are beside the point and calculated to produce a broad rule of decision in a non-adversarial posture.

III. BECAUSE THE CCA REVISITED THE ADEQUACY OF PETITIONER'S CONTEMPORANEOUS OBJECTION AFTER THIS COURT'S SUMMARY REVERSAL, THE CCA'S REQUIREMENT OF 'EGREGIOUS HARM' VIOLATED FEDERAL LAW.

Just as Respondent makes no effort to defend the CCA's conclusion that jurors were able to give effect to Petitioner's evidence via the special issues and nullification instruction, Respondent does not defend the CCA's prerogative to change its mind about the adequacy of Petitioner's *Penry* objection at trial in response to this Court's summary reversal. Instead, Respondent strains to claim no conflict between the pre-remand and post-remand treatment of Petitioner's trial objection. But the only fair reading of the CCA's opinions confirms that the CCA in fact changed its mind about the adequacy of Petitioner's trial objection only after this Court rejected its federal constitutional holding. Far from constituting an independent and adequate state ground of decision, the CCA's inconsistent treatment of Petitioner's trial objection amounts to an impermissible obstacle to the vindication of this Court's constitutional judgment. Moreover, the trial record confirms that Petitioner preserved his *Penry* claim and the CCA's contrary conclusion itself rests on a misunderstanding of the underlying federal constitutional claim.

Respondent argues that the charge that the CCA changed its mind about the adequacy of Petitioner's *Penry* objection at trial "conflates the doctrines of procedural default and harmless error." R.B. at 21. In Respondent's view, because the CCA did not actually impose a procedural default on remand (after declining to do so before remand), the CCA did not "revisit" its earlier conclusion regarding procedural default. *Id.* ("Just as before, the Court of Criminal Appeals in *Smith III* declined to find Smith's *Penry* challenge to be procedurally defaulted."). The problem with this argument is that *exactly* the same issue controlled whether Petitioner's claim was procedurally defaulted and whether Petitioner's claim was

unpreserved so as to trigger the "egregious harm" standard: whether Petitioner's *Penry* objection at trial was adequate to preserve his claim. If the CCA had deemed Petitioner's trial objection to be inadequate, it would have defaulted Petitioner's claim at the outset.

Recognizing this inconsistency, Respondent now insists that the best explanation for the CCA's refusal to default Petitioner's claim pre-remand is that *Penry* claims are not subject to procedural default. But this position finds no support in the opinions in this case. The four judges who would have imposed such a default pre-remand obviously asserted otherwise, and nothing in the post-remand opinions endorses Respondent's effort to harmonize the CCA's pre- and post-remand actions by disavowing the applicability of procedural default to *Penry* claims. If such harmonization were possible, it is reasonable to expect the CCA would have made the case, especially in light of the charge by the post-remand dissenting opinion that the CCA had simply reversed itself in finding Petitioner's *Penry* claim unpreserved. *See Ex parte Smith*, 185 S.W.3d at 479; JA: 311-312 (Holcomb, J., dissenting) ("[B]ecause the majority now suddenly thinks that Smith did not preserve error in the trial court – despite the fact that the majority once rejected the procedural default argument and twice addressed the claim on the merits, the majority applies our burdensome state-law 'egregious harm' analysis to Smith's Eighth Amendment claim.").

Nor does Respondent cite a single state or federal case that asserts that *Penry* claims are non-defaultable on state habeas under Texas law. As argued in Petitioner's initial brief, the CCA has plainly held such claims defaulted on state habeas, and the federal courts have consistently sustained such defaults on federal habeas. Respondent tries to explain away the CCA's imposition of a procedural default against the *Penry* claim that was at issue in *Nichols v. Scott*, 69 F.3d 1255, 1266 (5th Cir. 1995), by implying that the federal court must have mistakenly apprehended the CCA's imposition of such a default.

Respondent argues that the CCA's "underlying" opinion at issue in *Nichols* applied the "egregious harm" test of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985), and did not default the defendant's claim. R.B. at 26, n.29. Contrary to Respondent's representation, the CCA emphatically *did* default Nichols' claim on state habeas,[6] and the Fifth Circuit's decision specifically upheld that default in its opinion. 69 F.3d at 1266.[7] Indeed, Respondent has successfully defended scores of convictions in federal court on the ground that the jury-charge error was defaulted in state court, and recent federal case law confirms the unbroken line of cases on state habeas applying defaults to such claims. *Martinez v. Dretke*, 426 F. Supp. 2d 403, 527 (W.D. Tex. 2006).[8]

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[6] The CCA's order denying state habeas relief, *Ex parte Nichols*, Wr. No. 21,253-01 (Tex. Crim. App. Dec. 12, 1991), attached hereto, adopted the trial court's recommended findings of fact and conclusions of law, which stated that "the applicant is *procedurally barred* from advancing his [*Penry*] claim" concerning the adequacy of the special issues to ensure consideration of his non-triggerman status. *Ex parte Nichols*, Trial Court's Findings of Fact and Conclusions of Law (captioned "Respondent's Findings of Fact, Conclusions of Law and Order"), No. 323836-A, at 28 (June 28, 1991) (emphasis added), excerpt attached hereto.

[7] Respondent's misleading citation to the CCA's opinion on *direct appeal* in no way undercuts the fact that the CCA has consistently and unequivocally subjected constitutional claims concerning jury instructions to procedural default on state habeas. The CCA's reliance on *Almanza* on direct appeal is fully consistent with Petitioner's view that *Almanza* was designed as a standard for the consideration of unobjected-to error on *direct* review – a state analog to the federal "plain error" rule. Petitioner's Brief at 47 n.16. The application of *Almanza* in this way on direct appeal has never caused the CCA or any federal court to call into question the defaultability of such claims on state habeas.

[8] Conspicuously absent from Respondent's Brief is any effort to address the language from *Martinez* quoted in Petitioner's Brief; indeed, Respondent does not cite or discuss *Martinez* in its Brief.

More damning than the absence of any affirmative support for its assertion that *Penry* claims are not defaultable is Respondent's *own advocacy* in this litigation. On remand from this Court's summary reversal, Respondent argued vehemently that the CCA should impose the procedural default that it had declined to impose pre-remand. State's Brief on Remand at 7, JA: 246 ("Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal."). Respondent did so with the express promise to the CCA that such a ruling would foreclose further review of Petitioner's constitutional claim by this Court. *Id.* at 8; JA: 246-47. Respondent's Brief offers no explanation for advancing one interpretation of state law before the CCA when it regarded that interpretation as favorable to its cause, and then advancing a contradictory interpretation to this Court as it became convenient. Given that much of Respondent's Brief amounts to representations about the status of state law, and that Respondent has demonstrated a propensity to tailor such representations to suit its present needs, this Court should be particularly hesitant to credit Respondent's current insistence on the non-defaultability of *Penry* claims on state habeas, especially in the complete absence of any state or federal citations supporting that proposition.[9] In

[9] Respondent devotes considerable space to establish that the application of the *Almanza* rule to Petitioner's *Penry* claim on state habeas was not aberrational and consistent with "well-established Texas law." R.B. at 24. Notwithstanding the numerous citations contained in its brief, Respondent fails to identify a *single* case in which a defendant alleging *Penry* error was denied habeas relief for failing to establish egregious harm. Indeed, the only case Respondent cites as actually applying the egregious harm standard to a *Penry* claim was on direct appeal, *Chambers v. State*, 903 S.W.2d 21, 34-35 (Tex. Crim. App. 1995), and that case plainly *declined* to apply *Almanza*'s egregious harm standard to Chambers' *Penry* claim though it applied it to other issues. Respondent also fails to cite a *single* case over the last sixteen years in which the CCA applied the *Almanza* egregious harm standard on state habeas *at all*, *see* R.B. at 24 n.26 (cites to state habeas cases

(Continued on following page)

contrast, it should be noted that Petitioner has never in this litigation argued that *Penry* claims are non-defaultable, even when Respondent urged the CCA to impose such a default on remand.[10]

Accordingly, the CCA's refusal to impose a procedural default pre-remand cannot be dismissed on the grounds that such claims are not defaultable but rather must be read, as Judge Holcomb argued in dissent, as rejecting the claim that Petitioner's trial objection was inadequate. For the reasons urged in Petitioner's Brief, state courts must not be permitted to revisit procedural determinations post-remand to defeat the enforcement of this

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invoking *Almanza* end in 1989), confirming Petitioner's position that *Almanza* is a state-law analog to plain error review confined to *direct appeals*. Perhaps the most telling rebuttal to Respondent's claim that the "egregious harm" standard is a "well-settled" principle of law applicable to state habeas is the fact that Respondent argued post-remand for a *different standard* of harm to apply to this case. State's Reply Brief on Remand at 1; JA: 259 (contending that "it is the applicant's burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment") (citing *Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991)). Thus, the CCA's innovative invocation of the "egregious harm" standard in this case cannot plausibly be viewed as a routine application of state harmless error principles.

[10] Respondent's alternative argument that *Penry* claims are defaultable, but excused from default under the right-not-recognized doctrine, is likewise unavailing. While it is true that defendants tried *before* the *Penry* decision in 1989 were later excused for their lack of a contemporaneous objection under that doctrine, Petitioner was tried *after Penry* was decided. Moreover, just as with Respondent's argument about the non-defaultability of *Penry* claims, Respondent again contradicts its arguments below, where Respondent adamantly claimed that Petitioner's purported failure to make an adequate trial objection for his *Penry* claim could not fit within any exception to procedural default. State's Brief on Remand at 7-8; JA: 246. As indicated in our initial brief, P.B. at 45, these cases confirm the applicability of procedural default law to *Penry* claims.

Court's constitutional judgment, a basic proposition which Respondent does not dispute.[11]

Moreover, the CCA's pre-remand refusal to find Petitioner's *Penry* objection at trial inadequate was plainly correct, and Respondent's effort to defend its post-remand contrary finding is unavailing. Respondent acknowledges that Petitioner adequately challenged the inability of the

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[11] The *Amicus* Criminal Justice Legal Foundation ("CJLF") argues that state courts should not lose their ability to apply heightened standards of harm based on the absence of a contemporaneous objection merely because they addressed the merits of a federal constitutional claim prior to this Court's intervention. CJLF Brief at 4. Whatever the merits of that proposition, the *amicus* CJLF does not come to terms with the facts of this case, in which the claim regarding the inadequacy of the trial objection was raised, discussed, and not embraced by the state court. In such circumstances, the only fair reading of the state court action is that it *chose* not to impose the procedural impediment rather than overlooked it. Indeed, in such circumstances, the state court had clearly abandoned the procedural defense for virtually all purposes. If this case had proceeded unimpeded to federal habeas review, as do virtually all denials of state habeas relief in capital cases, the state could no longer seek enforcement of the purported procedural impediment. Under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the failure of the state court to invoke the procedural barrier would preclude its application on federal habeas review. The *only* circumstance in which the issue of the present case arises is when the state court seeks the belated enforcement of the procedural impediment *after* this Court has reversed the state court's federal constitutional determination on the merits. In these limited circumstances, state courts cannot, as in this case, send the signal to this Court that the case is not procedurally compromised, and then render this Court's opinion advisory by revisiting its determination of procedural irregularity. For this reason, the *amicus* CJLF's attempt to analogize to *federal* cases applying plain error review following remand from this Court is deeply flawed. CJLF at 5-8. *Federal* burdens to federal constitutional claims do not present the same hazards for this Court's jurisdictional limits as state procedural obstacles, which constitute independent and adequate grounds of decision. Second, in those federal cases, there is no parallel risk that the federal court is imposing the post-remand procedural obstacle to frustrate this Court's subsequent review or enforcement of federal constitutional norms.

special issues on their own to ensure consideration of Petitioner's mitigating evidence. Respondent also acknowledges that Petitioner objected to the nullification instruction on the basis that Texas law did not authorize any special verdict questions beyond those approved by the legislature. R.B. at 32. In Respondent's view, though, Petitioner's objections were inadequate for two reasons: because trial counsel did not specifically explain how the nullification instruction caused *Penry* error in his case and because trial counsel did not propose an alternative formulation of the nullification instruction. Both of these contentions are without merit. Contrary to Respondent's (and the CCA's) position, the nullification instruction did not *cause* the *Penry* error in his case, it simply failed to *fix* it, and Petitioner clearly and emphatically objected that his mitigating evidence could not be given adequate effect via the Texas special issue scheme.[12]

Nor was trial counsel obligated to tinker with the nullification instruction in order to preserve his claim. As this Court indicated in its summary reversal, the problem with the nullification in this case was not its particular phrasing; rather "*Penry II* identified a broad and intractable problem – a problem that the state court ignored here – inherent in any requirement that the jury nullify special issues contained with the verdict form." *Smith*, 543 U.S. at 46; JA: 233. Had Petitioner offered and the trial court adopted a different version of the nullification instruction, petitioner would have *waived* the resulting *Penry* error, which is precisely why Texas law has never required a defendant to offer an alternative instruction once he has objected to the proposed charge. *See Ex parte Smith*, 185

[12] Interestingly, in explaining the purportedly limited reach of *Penry II* in its briefs in *Brewer v. Quarterman*, No. 05-11287, and *Abdul-Kabir v. Quarterman*, No. 05-11284, the State offers precisely this account of *Penry II*: "In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I*." R.B. in *Brewer* at 24; R.B. in *Abdul-Kabir* at 23-24.

.W.3d at 476 n.6; JA: 306-307 (Holcomb, J., dissenting) quoting Texas Code of Criminal Procedure provision that tates that "in no event shall it be necessary for the efendant or his counsel to present special requested harges to preserve or maintain any error assigned to the harge").

Thus, the CCA's refusal to find Petitioner's trial objec-on inadequate pre-remand was correct, and the CCA's ost-remand contrary finding reflects a misunderstanding f Petitioner's federal constitutional claim under *Penry*. ccordingly, the CCA was wrong to apply its "egregious arm" standard as an obstacle to relief, and Petitioner's lain and undisputed showing of at least "some harm" ictates reversal of Petitioner's death sentence.

CONCLUSION

Neither Respondent nor the *amici* briefs filed on its ehalf come to terms with the only genuine issue in this tigation: whether state courts may flout this Court's irection following a summary reversal. This Court should rmly declare that a state court may not reject the federal onstitutional holding of this Court on remand and cloak s rejection in purported harmless error analysis.

Respectfully submitted,

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EX PARTE JOSEPH BERNARD NICHOLS

Habeas Corpus Application

WRIT NO. 21,253-01

from HARRIS County

(Tex.Crim.App. Dec. 12, 1991)

ORDER

This is a post conviction application for a writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

Applicant was convicted of the offense of capital murder on February 24, 1982. After the jury answered the special issues submitted under Article 37.071, V.A.C.C.P., in the affirmative, punishment was assessed at death. This Court affirmed applicant's conviction. Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988).

In the instant cause, applicant presents twenty-four (24) allegations challenging the validity of his conviction. The trial court, after holding an evidentiary hearing, has entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record with respect to the allegations now made by applicant and finds that the findings and conclusions entered by the trial court are supported by the record.

The relief sought is denied.

IT IS SO ORDERED THIS THE 12TH DAY OF DECEMBER, 1991.

PER CURIAM.

Clinton and Maloney, JJ., would grant nos. 13, 14 and 15.
En banc
Do not publish

CAUSE NO. 323836-A

EX PARTE	§	IN THE 178TH DISTRICT
	§	-COURT
JOSEPH BERNARD NICHOLS,	§	OF
	§	
Applicant	§	HARRIS COUNTY, TEXAS

(June 28, 1991)

RESPONDENT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having considered the Petition for Writ of Habeas Corpus, Applicant's First, Second and Third Amended Petitions for Postconviction Writ of Habeas Corpus, Respondent's Original Answer, Respondent's Amended Answer, the court-ordered affidavits, and the evidence elicited at the evidentiary hearing held in the above-captioned cause, the court makes the following Findings of Fact and Conclusions of Law based upon the documents filed in said cause and the official court records.

* * *

35. Because the applicant failed to request an anti-parties charge or to object to the jury instructions given at punishment on the basis that the Texas death penalty scheme precluded the jury from considering or giving effect to the mitigating evidence that the applicant allegedly did not kill the complainant, the applicant is procedurally barred from advancing his claim that the Texas death penalty scheme precluded the jury from assessing a life sentence after deciding that the applicant was less morally culpable based on its belief that the applicant was not the triggerman.

36. In the alternative, the special issues themselves focused the jury's attention on the applicant, not Willie Williams. Further, the language of the first special issue did not prevent the jury from giving proper weight or any weight to any mitigating evidence that the applicant did not fire the bullet which killed the complainant.

37. In the alternative, the jury's affirmative answer of the first special issue does not violate the precepts of **Edmund v. Florida**, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), and the imposition of the death penalty does not violate the eighth amendment or the precepts of **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978).

* * *

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number 323836-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 323836-A, including his Petition of Writ of Habeas Corpus and his first, second, and third Amended Petitions for Writ of Habeas Corpus;

2. the Respondent's Original Answer and the Respondent's Amended Answer in cause number 323836-A;

3. this court's findings of fact, conclusions of law and order denying relief;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent;

5. a transcript of the writ evidentiary hearing held on October 19, 1990, and November 2, 1990;

6. the affidavits of Robert Scott and Neil Lane;

7. the appellate record in State v. Willie Ray Williams, Cause No. 323764, unless it has been previously forwarded to the Court of Criminal Appeals;

8. the indictment, judgment, sentence, docket sheet, and appellate record in cause number 323836, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Michael Kuhn and Sarah Cowen, Bracewell & Patterson; 2900 South Tower Pennzoil Place; Houston, Texas 77002, and to Respondent: Roe Wilson; Harris County District Attorney's Office; 201 Fannin; Houston, Texas 77002-1901.

SIGNED this 28 day of June, 1991.

/s/ William Harmon
JUDGE PRESIDING